United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 75-7032

United States Court of Appeals
For the Second Circuit

B

P/S

BEACON CONSTRUCTION COMPANY INC.,
PLAINTIFF, APPELLEE,

v.

MATCO ELECTRIC COMPANY, INC.,
d/b/a DWYER ELECTRIC CO., INC.,
DEFENDANT, APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF ISSUES

Whether the District Court was correct in ruling that it had jurisdiction of the action.

Whether the District Court was correct in granting declaratory relief, declaring void the notice of lien and the bond given to dissolve the lien.

Whether the District Court was correct in awarding appellee damages in the amount it paid as a bond premium.

STATEMENT OF THE CASE

Plaintiff sought declaratory relief declaring void a notice of mechanic's lien filed by the defendant as well as a bond given by the plaintiff to dissolve the lien. Plaintiff also sought to recover the premium it paid for the bond. (App. p. 18). Defendant moved to dismiss the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction. (App. p. 7). Plaintiff moved for summary judgment (App. p. 19). The District Court denied defendant's motion to dismiss, granted plaintiff's motion for summary judgment (App. p. 33) and entered judgment (1) declaring that the notice of lien filed by the defendant was null and void, (2) that the bond given by the plaintiff to dissolve the lien was void, (3) awarding plaintiff damages in the amount of $3516.00, the amount it paid as a premium on the bond (App. p. 43). The defendant appealed.

Plaintiff is a Massachusetts corporation with its principal place of business in Massachusetts, the defendant is a New York corporation with its principal place of business in New York. (App. p. 1). In 1972, plaintiff was engaged in the construction of a housing project for the elderly in Rochester under a contract with Clinton Ave. Paul Place Houses, Inc. (the owner), a corporation organized under the Private Housing Finance Law of New York and a subsidiary of the New York State Urban Development Corporation (UDC). (App. p. 4). Under date of September 20, 1972, plaintiff entered into a subcontract with the defendant, whereby defendant agreed to furnish and install all labor, material and equipment to provide complete interior electrical and exterior electrical systems for an agreed price of $348,000.00 (App. p. 4). The subcontract included an agreement by the defendant-subcontractor

"that no mechanic's or other lien, notice of contract or other claims or charges shall be filed or maintained by it against the said buildings and improvements and real estate appurtenant thereto or any part thereof, for or on account of any work or labor done or materials furnished under this subcontract or otherwise, for, toward in or about the erection and construction of said buildings and improvements . . . The Subcontractor hereby formally and irrevocably releases and waives any and every mechanic's, materialman's and any and every other lien, charge and claim of any nature whatsoever that it has or may at any time be entitled to have against the aforementioned buildings, improvements and real estate, . . ." (App. p. 21).

Nevertheless, the defendant, on August 29, 1974, filed a notice of mechanic's lien in the county clerk's office in the amount of $293,001.52. (App. p. 6). The effect of the filing of such notice was to create an encumbrance on the interest of the owner and to impede or prevent the release of funds by the construction lender (App. p. 22). On October 3, 1974, plaintiff, and a surety executed a bond in the penal sum of $351,601.82 (App. p. 14) and obtained a dissolution of defendant's lien. (App. p. 26). The cost of the bond to the plaintiff was $3516.00 in premiums paid to the Aetna Casualty and Surety Company (App. p. 25).

ARGUMENT

I. The District Court Had Jurisdiction Over the Action by Reason of Diversity of Citizenship of the Parties and an Amount in Controversy in Excess of Ten Thousand Dollars.

A. *Parties*

The statute conferring diversity jurisdiction upon the district courts is 28 U.S.C. §1332. In pertinent part, it provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—

"(1) citizens of different states;

* * *

"(c) For the purposes of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . ."

The complaint, without apparent contradiction, alleges that the plaintiff is, by definition of §1332(c) a citizen of Massachusetts and the defendant a citizen of New York.

Appellant, however, argues, as it did in the court below, that the owner, by definition a citizen of New York, is an indispensable party to this litigation whom appellee has failed to join and whose joinder would destroy the complete diversity required for the exercise of the court's jurisdiction. *Strawbridge* v. *Curtis*, 3 Cranch. 267 (1806). The owner would be a necessary party, so the argument goes, in an action brought in the state courts of New York to foreclose the lien, and is, therefore, a necessary party to this action to vacate it.

But, while appellant's argument is superficially logical, it is not legally tenable. The action is one brought by one of two parties to a contract against the other party to the contract to resolve a controversy between them concerning their rights and obligations under that contract. While the owner may reap the benefit of an adjudication favorable to the appellee, benefit alone, or a peripheral connection with litigants in their contractual relationship, is not sufficient to require joinder of an additional party in an action in which a plaintiff seeks, in effect, specific enforcement of rights under a contract. *Freedman* v.

Maguire, 110 F. Supp. 209 (S.D.N.Y., 1953). Indeed, in actions for declaratory judgment seeking an interpretation of a written agreement, it may not be necessary to join all of the parties to a multi-party contract if a judgment can be entered which determines the controversy between the litigants and does not prejudice the other interested parties. *Texas & Pacific Railway* v. *City of New Orleans*, 159 F.2d 78 (5th Cir., 1947).

An indispensable party to an action is one who

> "not only [has] an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrows*, 17 How. 130 (1854).

The only interest in the outcome of this case which the owner ever had concerned the real property affected by the filing of the notice of mechanic's lien. By virtue of the filing of the bond on October 3, the real property was no longer subject to any claim of the appellee. Lien Law (N.Y.) §19(4). The owner, therefore, is in no way affected by the outcome of this action.

B. *Amount in Controversy*

Appellant's argument that the amount in controversy is the $3516.00 bond premium which appellee paid and for which it was awarded judgment borders on the frivolous. The amount in controversy is not necessarily the monetary judgment sought to be recovered or even the amount recovered, but is rather the value of the pecuniary consequence which results from the litigation. *Smith* v. *Adams*,

130 U.S. 167, 175 (1889). Moreover, the amount should be viewed by the court from the plaintiff's point of view, and judged as of the time that the court's jurisdiction was invoked. *Smithers* v. *Smith*, 204 U.S. 632, 642 (1907). The present action was brought to determine the validity of a lien filed by appellant in the amount of $293,001.52 (App. p. 6). By amendment, appellee sought the invalidation of its liability on a bond (upon which it was principal obligor) in the amount of $351,601.82. (App. p. 18). This was the real amount in controversy and the claim for reimbursement of bond premiums was only ancillary to the principal claim.

II. The Complaint Sets Forth a Claim For Relief and the Motion To Dismiss Was Correctly Denied.

"In a case of actual controversy within its jurisdiction, any court of the United States . . . may declare the rights and other legal relations of any interested party, whether or not further relief is or could be sought." 28 U.S.C. §2201.

The record clearly shows a controversy within the jurisdiction of the district court. In filing its notice of lien, appellant clearly took the position that nothing in its contract with appellee precluded its right to do so. Appellant disputes this contention and invokes paragraph 14 of the terms and conditions of the subcontract as a contractual waiver by appellant of its right to file a lien. Having filed a notice of mechanic's lien, appellant might be expected, within the time permitted by law, to bring an action to foreclose the lien. Appellee is not required to await the bringing of such an action in order to raise a defense. The effect of §2201 is to allow a potential defendant to strike first and bring an action for declaratory

relief as to its rights and liabilities. *Evers* v. *Dwyer*, 358 U.S. 202 (1958). *Luckenback Steamship Co.* v. *United States*, 312 F.2d 545 (2d Cir., 1963). *Elkanich* v. *Alexander*, 430 F.2d 1178 (10th Cir., 1970).

III. The Court Properly Granted Appellee's Motion For Summary Judgment With Respect to the Declaratory Relief Sought.

The motion for summary judgment was supported by an affidavit of a vice president of appellee to which were appended copies of the subcontract and of the various lien notices given by appellant (App. p. 20) and an affidavit of an attorney representing appellee setting forth the filing of a bond to discharge the lien and the cost thereof. (App. p. 24). No affidavits contradicting any of the facts set forth in either affidavit were filed by appellant and the facts set forth in appellee's motion papers are to be taken as true. These show that appellant, in the subcontract which it signed agreed that no mechanic's lien would be filed by it against the real property of the owner and it "releases and waives any and every . . . lien" which it might have. (App. pp. 21-22). It even agreed that the filing of a lien might be grounds for termination of the contract under the "termination for default" clause. (App. p. 4, ¶14).

Section 34 of the Lien Law provides that "A subcontractor . . . may not waive his lien, except by an express agreement in writing specifically to that effect signed by him or his agents." The New York courts have construed this section to require that the waiver of lien be contained in a document signed by the subcontractor himself and not merely in one incorporated by reference. *C. H. Heist Ohio Corp.* v. *Bethlehem Steel Co.*, 20 A.D.2d 201, 246

N.Y.S. 2d 15 (1964). A waiver of lien clause such as is involved in this case, contained, as it is, in the contract signed by the subcontractor, is binding and enforceable. *Application of Mars Associates, Inc.*, 17 Misc. 2d 188, 184 N.Y.S. 2d 253 (1959). *J. B. Cieri Construction Co., Inc.* v. *Gramercy Construction Corp.*, 13 A.D. 2d 901, 215 N.Y.S. 2d 994 (1961). Such waiver is final and irrevocable and the right to file a lien cannot be revived, even with the oral consent of the general contractor. *Arr-Em Plastering Corp.* v. *515 East 85 Street Corp.*, 226 N.Y.S. 2d 944 (1966).

The waiver provision in a subcontract is an independently-enforceable covenant. Its effect may not be avoided by the argument that it is rendered inoperative by an alleged breach on the part of the general contractor. *Cummings* v. *Broadway-94 Street Realty Co.*, 233 N.Y. 407 (1922). *Better Home Improvement Corp.* v. *Forovus Realty Corp.*, 235 NYS 2d 209 (1962). To hold "that a breach of contract destroys the waiver of lien makes the waiver illusory. It could, upon such reasoning, never be of value and its insertion in the contract would be a nullity." *Northampton Construction Corp.* v. *Bestrian*, 143 N.Y.S. 2d 461, 463 (1955).

IV. The Court Properly Awarded Appellee the Amount of the Bond Premium as Damages.

The court correctly ruled that the appellant breached its contract when it caused a notice of lien to be filed in the county clerk's office. If the filing of the notice was a breach, then the cost of obtaining a bond to discharge the lien was clearly an expense which appellee would not have incurred absent such breach.

Section 39-a of the Lien Law authorizes the imposition of damages upon the lienor, including "the amount of any

premium for a bond given to obtain the discharge of the lien . . ." whenever a court declares a lien void on account of wilful exaggeration. The statute indicates a clear intent to protect owners and contractors from the expense of discharging liens which exaggerate the lienor's rights. *Durand Realty Co.* v. *Stolman*, 94 N.Y.S. 2d 358 (1949) *affirmed* 113 N.Y.S. 2d 644 (1952). If New York's legislature would hold one liable for such damages for exaggerating the *amount* of his lien, how much more so is one liable for such damages who frivolously tries to avail himself of a right which he has, by his contract, waived. As in the case of the declaratory relief, appellee is not required to await the bringing of a lien foreclosure action to recover these damages. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. §2202. That such "further relief" may include an award of damages is well settled. *Security Insurance Company of New Haven* v. *White*, 236 F.2d 215 (10th Cir., 1956). *Texasteel Mfg. Co.* v. *Seaboard Surety Co.*, 158 F.2d 90 (5th Cir., 1946). *Hudson* v. *Hardy*, 424 F.2d 854 (D.C. Cir., 1970).

The award of damages was requested by appellee in paragraph (3) of the demand for judgment contained in its amended complaint (App. p. 18) and in its motion for summary judgment (App. p. 19). The "reasonable notice and hearing" requirements of the statute were, therefore, satisfied.

CONCLUSION

The District Court had jurisdiction of the action. There was no failure to join necessary parties. The declaratory relief and damages awarded by the District Court were proper.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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March 26, 1975

A. Daniel Fusaro, Esq., Clerk
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Dear Sir:

Herewith are twenty-five copies of the Brief for the Appellee in No. 75-7032,

BEACON CONSTRUCTION COMPANY, INC.,
Plaintiff, Appellee,